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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

SALAMONIE PACKING COMPANY,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

No. 631

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
for the Eighth Circuit.

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Cases Cited.

Statutes Cited.

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To the United States Circuit Court of Appeals for the Eighth Circuit.

Salamonie Packing Company prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above entitled cause on January 6, 1948, affirming the judgment of the District Court of the United States for the Eastern District of Missouri.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in this case is unreported as yet, but will be found at page 316 of the record herein.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; Title 28, U. S. C. A., Section 347).

QUESTION PRESENTED.

The question presented is this:

Does the mere presence of some decomposition in an article of food render the article "adulterated" within the meaning of Section 342 (a) (3) of Title 21, U. S. C. A., and therefore subject to condemnation and destruction under the Federal Food, Drug and Cosmetic Act, **even though the article is proved to be fit for food?**

Or, putting the same question in different form:

Must an article of food be proved to be unfit for food before it can be adjudged to be "adulterated" within the meaning of Section 342 (a) (3) of Title 21, U. S. C. A.?

[The pertinent language of Section 342 is as follows: "A food shall be deemed to be adulterated—(a) * * * (3) If it consists in whole or in part of any filthy, putrid or decomposed substance, or if it is otherwise unfit for food * * *."]

SUMMARY STATEMENT.

This case originated in the District Court for the Eastern District of Missouri. It is a consolidation of five separate libels for seizure and condemnation of canned tomato juice. These libels were filed as follows:

1. In the Eastern District of Missouri, Eastern Division, for 2050 cases, more or less, each containing six No. 10 cans of tomato juice (Rec. p. 2).

2. In the Northern District of Ohio, Eastern Division, for 1397 cases, each containing 6 No. 10 cans of tomato juice (Rec. p. 4).

3. In the Western District of Pennsylvania for 422 cases, each containing 6 No. 10 cans of tomato juice (Rec. p. 6).

4. In the Western District of Pennsylvania for 800 cases, each containing 6 No. 10 cans of tomato juice (Rec. p. 8).

5. In the Northern District of Ohio, Western Division, for 1792 cases, each containing 6 No. 10 cans of tomato juice (Rec. p. 10).

The contested charge in each libel was substantially as follows:

> "That the aforesaid article was adulterated in interstate commerce within the meaning of 21 U. S. C. 342 (a) (3) in that it consisted wholly or in part of a decomposed substance by reason of presence therein of decomposed tomato material."

In a Bill of Particulars the government stated that the decomposed tomato material was evidenced by the presence of mold and rot fragments (Rec. pp. 13 and 14).

The petitioner, claimant below, filed answer containing the following clause:

> "Claimant denies all of the allegations contained in paragraph 3 of each of the libels * * * and states that the tomato juice involved in these libels was neither harmful nor poisonous, but good and safe for human consumption" (Rec. p. 16).

On motion of the government the court ordered stricken out that part of the answer which alleged the tomato juice was fit for human consumption (Rec. pp. 25 and 26).

The respondent presented evidence before the jury based on laboratory tests and the conclusions of respondent's expert witnesses therefrom, that the tomato juice contained a certain microscopic amount of mold and decomposed tomato material. The respondent presented no evidence that the tomato juice was unfit for consumption and did not show any of the juice to the jury.

At the conclusion of the respondent's case the petitioner moved for a directed verdict on the ground that the respondent had not presented sufficient evidence to sustain the libels for the reason that there was no evidence that the tomato juice was not fit for food (Rec. p. 163). The trial court overruled this motion, to which ruling exception was taken (Rec. p. 165). Petitioner presented uncontradicted evidence that the tomato juice was a good and wholesome product, that it was fit for food, and that petitioner's employees drank it with their lunch every day at the factory; and two of the witnesses tasted samples and pronounced them good and wholesome (Rec. pp. 168, 178, 179, 249).

At the conclusion of all of the evidence petitioner renewed its motion for directed verdict, which was again overruled and exceptions taken (Rec. pp. 277-278).

The jury returned a verdict in each of the cases in favor of the libelant and against the claimant (Rec. p. 307).

Pursuant to the verdict the trial court ordered and decreed that the juice in each case be destroyed.

During the course of his instructions the court instructed the jury as follows:

> "Therefore, if you shall find and believe from the evidence to your clear satisfaction that the tomato juice in this case is in whole or in part adulterated by the presence of filthy, putrid, or decomposed substance, in whole or in part, it doesn't make any difference what the part is, it need not render the food, so far as the law is concerned, unfit for human consumption so far as your opinion about that is concerned" (Rec. p. 301).

To which instruction the claimant made the following objection:

> "Claimant wishes to except to the court's charge to the jury on the ground, first, that the Court failed to instruct the jury that in order that the jury may find that tomato juice be adulterated, the jury must first find that it be adulterated in the sense that it consisted in whole or in part of a filthy, putrid or decomposed substance, or was otherwise unfit for food.
>
> "In that connection claimant specifically objects to the court's failure to include the last six words of the statutory definition of adulteration, to-wit: 'or was otherwise unfit for food.'
>
> "Secondly, on the ground that the court failed to instruct the jury that if the jury believe from the evidence that it is practically impossible in actual practice to free tomato juice entirely at all times from the presence of mold and decomposed fragments, and that such mold and decomposed fragments were present in the tomato juice under consideration in this

case, in such insubstantial quantities that the jury would not regard it as filthy, putrid or decomposed in the usual, natural and practical sense of these words, that then the jury must find for the claimant" (Rec. p. 303).

From the above judgment the petitioner appealed to the Eighth Circuit Court and alleged two errors as follows:

1. "An article of food must be proved unfit for food before it can be adjudicated to be adulterated within the meaning of Sec. 342 (a) (3) of Title 21 U. S. C.

2. "Evidence of fitness for food is admissible in determining whether food is adulterated within the meaning of Sec. 342 (a) (3) of Title 21, U. S. C."

The Eighth Circuit Court affirmed the lower court and interpreted Sec. 342 (a) (3) of Title 21, U. S. C., as requiring the seizure and condemnation of food if it is decomposed in any degree even though it may be fit for food.

REASONS FOR GRANTING WRIT.

I.

The Circuit Court of Appeals Has Rendered a Decision in Conflict With the Decisions of Other Circuit Courts of Appeal on the Same Matter.

The decision of the Circuit Court in this case is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case of **Van Camp Sea Food Company, Inc., v. U. S.**, 82 F. (2) 365 (C. C. A. 3d, 1936), and with the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of **A. O. Anderson & Co. v. U. S.**, 284 F. 542 (C. C. A. 9th, 1922).

II.

The Circuit Court of Appeals in This Case Has Decided a Federal Question in a Way Which Is in Conflict With an Applicable Decision of the United States Supreme Court.

The decision of the Court of Appeals in this case places an interpretation upon the meaning of a Federal statute which is in conflict with the decision of the United States Supreme Court in the case of **Sligh v. Kirkwood** (1915), 237 U. S. 52, in which this court construed statutory language similar to the pertinent language of Section 342 (a) (3).

III.

The Circuit Court of Appeals in This Case Has Decided an Important Question of General Law in a Way That Is Untenable.

The decision of the Court of Appeals in this case militates against every consideration of reason and common

sense, in that it construes a federal statute in such a way as would authorize the condemnation and destruction of many essential, wholesome and desirable articles of food such as cheese, sauerkraut, meat and bread.

IV.

The Circuit Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

The question of whether an article of food must be proved unfit for food before it can be adjudicated to be adulterated within the meaning of Section 342 (a) (3), Title 21, U. S. C. A., has been presented to and determined by several Circuit Courts of Appeal and District Courts, but has not yet been presented to the United States Supreme Court. Because of its obvious importance to the food industry as well as to the general public, the question should be finally settled and determined by this Court.

BRIEF

In Support of Petition for Writ of Certiorari.

I.

The Circuit Court of Appeals Has Rendered a Decision in Conflict With the Decisions of Other Circuit Courts of Appeal on the Same Matter.

The words "or if it is otherwise unfit for food," appearing in Section 342 (a) (3) of Title 21, U. S. C. A., were added to the preceding language defining the term "adulterated" in the year 1938 when the Federal Food and Drugs Act of 1906 was overhauled and revised and its name changed to the Federal Food, Drug and Cosmetic Act. Prior to the addition of these words, some basis had apparently existed for the contention that the question of fitness for food was immaterial since the only requirement expressed in the statute was proof that the article of food contained "a filthy, putrid or decomposed substance." In two recorded instances, this contention reached a Circuit Court of Appeals—these instances being in he case of **A. O. Anderson & Co. v. U. S.**, supra, and in the case of **Vamp Camp Sea Food Co., Inc., v. U. S.**, supra. The contention was repudiated in both of these cases.

In the first, the **Anderson** case, the Court, recognizing that "the statute must be given a reasonable construction to carry out and effect the Legislative policy or intent" cited (l. c. 544), the following passage from the case of U. S. v. Two Hundred Cases of Catsup (D. C.), 211 Fed. 780:

> "* * * each case must be determined on its own facts, and when it appears, as in this case, that the food is **so decomposed as to be unfit for food**, it comes

within the letter and spirit of the law." (Our emphasis.)

In the **Van Camp Sea Food Co.** case, the Court was even more explicit and emphatic. In that case, as in the instant case, the Government contended that some cartons of canned sardines were adulterated in that the product consisted in part of a decomposed substance. In that case, as here, the Government's proof consisted entirely of laboratory findings of decomposition in which, as the Court said: "fitness for food was not the criteria." The sardines were not subjected to smell or taste. In reversing the judgment below, based upon the jury verdict, and ordering dismissal of the suit, the Court of Appeals referred to the Government's "failure to open up boxes of these sardines and submit them to the inspection of the jury." Said the Court:

> "The whole situation could have been solved had the cans been submitted to the jury, who could have, by the sense of smell and taste, determined whether the sardines were fit for food."

The foregoing two cases clearly hold that unfitness for food must be read into the definition of adulteration even though the statute itself makes no mention of this requirement. The only question remaining therefore is whether the addition of the statutory words "or if it is otherwise unfit for food" eliminated such requirement.

The Circuit Court of Appeals for the Tenth Circuit in the case of **U. S. v. 1851 cartons, etc.**, 146 F. (2) 760, 1945), has apparently held that the additional words eliminated the requirement. The Circuit Court of Appeals in the present case has adopted the view expressed in that case. Petitioner respectfully submits that the decisions in these two cases are in conflict with the decisions in the **Anderson** and **Van Camp** cases, supra, for the following reasons:

Examination of the various amendments effected by the 1938 statute plainly indicates that the general purpose of these amendments was to broaden the scope of the law and thereby make it more effective. With this purpose in mind Congress sought, among other things, to broaden the definition of an adulterated article of food. Under the prior language of the law, adulteration, as defined in Sec. 342 (a) (3), was confined to filth, putridity or decomposition. By adding the words "or if it is otherwise unfit for food" Congress declared that even though the article of food was not filthy, nor putrid, nor decomposed, it would nevertheless be deemed adulterated if it was unfit for food "otherwise," i. e., for any other reason besides filth, putridity or decomposition. Thus, under the new language, fruits and vegetables that were so unripe as to be unfit for food could be adjudged adulterated even though they contained no filth, putridity or decomposition.

This construction of the effect of the added words not only gives meaning to the word "otherwise," it also avoids nullification of two federal appellate decisions of which Congress must have been fully aware at the time the amendment was adopted. Had Congress intended such nullification, one would certainly expect to find some reference to this intent in the record of the committee hearings and congressional debates and proceedings that attended the passage of the law of 1938. The record is silent on any such intention.

II.

The Circuit Court of Appeals in This Case Has Decided a Federal Question in a Way Which Is in Conflict With an Applicable Decision of the United States Supreme Court.

In holding that the words "or if it is otherwise unfit for food" do not qualify the preceding words, the Court of

Appeals in the instant case, though agreeing with the decision of the Tenth Circuit Court of Appeals in **U. S. v. 1851 Cartons, etc.**, supra, apparently disagrees with an interpretation placed upon almost identical language by the United States Supreme Court in the case of **Sligh v. Kirkwood**, 237 U. S. 52. The latter case was decided in 1915 and passed upon the validity of a Florida statute which made it unlawful to sell, ship or deliver for shipment any citrus fruits which were immature "or otherwise unfit for consumption." In passing upon the validity of this statute the Supreme Court held that under the provisions of the Act the fruit must not only be immature, but be "unfit for food." The Court distinctly stated that it did not consider what its opinion would have been if the prohibition was only against immature fruit, but that since it also had to be unfit for food, it was clearly within the right of the police power of the state. In other words, this Court has held that a phrase containing the words "or otherwise unfit for" must be construed as qualifying the previous part of the sentence.

III.

The Circuit Court of Appeals in This Case Has Decided an Important Question of General Law in a Way That Is Untenable.

The decision of the Court of Appeals in this case militates against every consideration of reason and common sense, in that it construes a federal statute in such a way as would authorize the condemnation and destruction of many essential, wholesome and desirable articles of food, such as cheese, sauerkraut, meat and bread. If the decision of the Court of Appeals in this case is allowed to stand, then the federal agency which administers the Food, Drug and Cosmetic Act would have the legal right and authority to seize and have condemned and destroyed an almost infi-

nite variety of essential, wholesome and desirable foodstuffs. For it is common knowledge that many such foodstuffs contain decomposition. A few examples will suffice. Most fine cheeses, like Roquefort, Camembert and Limburger, teem with moldy and decomposed matter. Sauerkraut contains decomposed substances. Meat that is aged and tender contains decomposition. Even bread, through the action of the yeast added to the flour, is essentially a decomposed vegetable product. If the Government's theory in this case is right, any of these articles of food could be seized at the will of the federal agency on the ground that it consisted in whole or in part of a decomposed substance, regardless of the fact that it is perfectly fit for food.

It is certainly no adequate answer to say that no agency administering the Act would think of seizing such common and wholesome foods. The point is that a construction of the statute which would authorize or make such action even possible is untenable, particularly where, as here, a different construction is not only possible, but supported by the actual language of the statute, judicial interpretations and common sense.

IV.

The Circuit Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

Although this Court did, in the case of **Sligh v. Kirkwood**, supra, decide the effect of language in a Florida statute similar to that in the statute here under discussion, it has not yet directly passed upon the interpretation to be given the words in the federal Act. As has been seen, the Circuit Courts of Appeals are at present in conflict on the subject. Because of its obvious importance to the food industry, as well as to the general public, the question should be finally settled and determined by this Court.

Wherefore, Petitioner prays that this Court issue its Writ of Certiorari directed to the United States Circuit Court of Appeals for the Eighth Circuit, and that the decision of that Court in this case be reviewed by this Court.

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